

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JAY L. HOLLOWAY</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>WICHITA TOOL COMPANY, INC.</b>	)	
Respondent	)	Docket No. 214,636
	)	
AND	)	
	)	
<b>CONTINENTAL WESTERN INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed Administrative Law Judge John D. Clark's Award dated June 21, 2001. The Board heard oral argument on January 15, 2002, by telephone conference.

**APPEARANCES**

Claimant appeared by his attorney, Robert R. Lee. Respondent and its insurance carrier appeared by their attorney, Nathan D. Burghart.

**RECORD & STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

This is an appeal from a review and modification proceeding. The Administrative Law Judge denied claimant's request to modify the Award to a permanent total disability.

The sole issue raised on review by the claimant is the nature and extent of claimant's disability. Claimant argues his condition has deteriorated and he is now permanently and totally disabled as a result of the injuries he suffered on August 2, 1995.

Conversely, the respondent argues claimant has failed to establish his condition has worsened as a result of the injuries suffered August 2, 1995, and respondent further argues claimant has failed to establish he is permanently incapable of engaging in substantial and gainful employment. Accordingly, respondent concludes the Administrative Law Judge's Award should be affirmed.

### FINDINGS OF FACT

Having reviewed the record and considering the parties' briefs and oral arguments, the Board makes the following findings and conclusions:

The Board agrees with the findings of fact and conclusions of law that are set out in the Award. It is not necessary to repeat those findings and conclusions. Therefore, the Board adopts the Administrative Law Judge's findings and conclusions as its own as if specifically set forth herein.

The claimant suffered a work-related injury on August 2, 1995, while lifting an overhead garage door. Claimant complained of low back pain radiating into his right buttock and leg. After conservative treatment did not improve his condition, claimant underwent an L5-S1 laminectomy using a ray cage and local bone graft. The surgeon, Kris Lewonowski, M.D., released claimant on September 21, 1998, and placed claimant in a light work category based upon the results of a functional capacities evaluation.

The Administrative Law Judge entered an Award on September 1, 1999, finding claimant suffered a 63 percent work disability. On January 13, 2000, the Board modified the Administrative Law Judge's Award to a 25 percent work disability. On July 12, 2000, claimant filed for review and modification pursuant to K.S.A. 44-528. On June 21, 2001, the Administrative Law Judge denied claimant's request for modification to a permanent total disability.

Claimant testified he has neither worked nor sought employment since his medical release from treatment in September 1998. Claimant is currently receiving social security disability benefits. The claimant testified that his new symptoms since December 1998 include groin pain and left foot numbness.

Claimant testified his condition has worsened. He testified he has low back pain from the incision site, down into the groin, extending into both legs. He further testified his right foot is numb all the time and the left foot goes numb with activity such as driving.

Claimant testified he has pain in his right leg all the time but it gets worse with increased activity.

Claimant's typical day is comprised of taking a shower, stretching some, eating, walking, reading his Bible and watching television. He sometimes goes to nursing homes and spends 30-60 minutes visiting and ministering to people. This activity usually is once or twice a week. As previously noted, claimant has not worked anywhere nor has he looked for any type of employment since September 1998.

Dr. Lewonowski performed surgery on the claimant in June 1997 and released the claimant to light work on September 21, 1998. Claimant saw Dr. Lewonowski on December 22, 1998, due to problems with his right flank. Dr. Lewonowski did not feel the claimant's right flank pain and his footdrop were related to his back. Dr. Lewonowski testified the claimant had an EMG and nerve conduction studies which did not show any evidence of radiculopathy. Dr. Lewonowski concluded it was odd for the claimant to have footdrop and not have any EMG changes. He also testified the claimant never demonstrated the footdrop on exam.

On March 7, 2000, claimant again saw Dr. Lewonowski. Claimant complained of groin pain, increased left lower extremity numbness and right leg pain. Dr. Lewonowski found no new changes. Dr. Lewonowski testified he did not know the origin of claimant's groin pain as well as his left foot numbness because the claimant's EMGs were normal and he did not have peripheral neuropathy. Dr. Lewonowski testified he could not find any objective findings to substantiate claimant's varied complaints. Dr. Lewonowski testified the claimant's fusion using the ray cage was solid.

Dr. Lewonowski opined the claimant is not capable of any gainful employment. But this conclusion was based upon the fact that claimant's complaints of pain override any physical capabilities that he has to work.

Dr. Mills examined the claimant on January 3, 2001, at the request of respondent's attorney. Dr. Mills performed a physical examination of the claimant, took claimant's history and also reviewed medical records. Dr. Mills noted claimant's subjective complaints of pain were not supported by physiological findings. The doctor noted claimant demonstrated significant pain behavior with slow movement, a hysterical base ambulation type pattern, and grimacing. There was increased pain with axial compression and rotation. However, Dr. Mills opined the claimant was not in acute pain upon physical examination because claimant was able to sit continuously for 60 plus minutes.

Dr. Mills testified the claimant would have some range of motion limitations based on the surgery but he was not able to determine the claimant's limits. Dr. Mills opined the claimant had a chronic pain problem.

Dr. Mills testified symptom magnification may have been present or the symptoms could be secondary to chronic pain syndrome. Dr. Mills was not able to determine whether or not claimant was magnifying or whether it was the chronic pain symptomatology. Dr. Mills testified that chronic pain syndrome has various factors such as physical, injury, non-physical, emotional and social factors which are all considered.

Dr. Mills opined he was not able to find any real reason for the claimant to be worse as far as trauma, injury, or something like that. Dr. Mills felt it was related to the decreased activity rather than further injury. Dr. Mills opined the claimant was capable of doing sedentary work from a physical standpoint.

### **CONCLUSIONS OF LAW**

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, be increasing or diminishing the compensation subject to the limitation provided in the workers compensation act.<sup>1</sup>

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<sup>1</sup>K.S.A. 44-528.

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.<sup>2</sup> If there is a change in the claimant's work disability, then the award is subject to review and modification.<sup>3</sup>

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.<sup>4</sup> Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.<sup>5</sup>

Claimant argues that although upon physical examination his condition remains unchanged, nonetheless, his increased pain renders him incapable of any substantial and gainful employment.

Dr. Lewonowski testified he could not find any objective findings to substantiate claimant's varied complaints. Dr. Mills agreed that claimant's subjective complaints were not always consistent with the objective findings. Dr. Mills further noted he was not able to find any real reason for the claimant to be worse and concluded it was related to claimant's decreased activity rather than further injury.

The claimant had complained of back pain, leg pain and numbness in the feet prior to the Award in this case. Those complaints continued. In addition, claimant complained of groin pain, footdrop and flank pain. The Administrative Law Judge relied on the treating physician's conclusion that the majority of claimant's present complaints are not related to the claimant's back injury.

The Board agrees that Dr. Lewonowski's findings are persuasive. Specifically, Dr. Lewonowski noted claimant had consistently complained of back pain, leg pain and numbness in the feet. Dr. Lewonowski was adamant the objective diagnostic testing established the new complaints of groin pain, footdrop and flank pain were not related to the original work-related injury to the claimant's low back. Accordingly, the Board concludes the preponderance of the credible evidence does not support finding a change in claimant's condition attributable to his work-related injury suffered August 2, 1995. The Administrative Law Judge's Award is affirmed.

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<sup>2</sup>See Nance v. Harvey County, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

<sup>3</sup>See Garrison v. Beech Aircraft Corp., 23 Kan App. 2d 221, 225, 929 P.2d 788 (1996).

<sup>4</sup>Morris v. Kansas City Bd. of Public Util., 3 Kan App. 2d 527, 531, 598 P.2d 544 (1979).

<sup>5</sup>See, e.g., Gile v. Associated Co., 223 Kan. 739, 576 P.2d 663 (1978); Coffee v. Fleming Company, Inc., 199 Kan. 453, 430 P.2d 259 (1967).

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated June 21, 2001, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant  
Nathan D. Burghart, Attorney for Respondent  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director